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NO. 84-1198

Supreme Court, U.S.

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1984

THE STATE OF TEXAS,

Petitioner

v.

SANFORD JAMES McCULLOUGH,

Respondent

On Writ of Certiorari to the  
Court of Criminal Appeals of Texas

**BRIEF FOR PETITIONER**

RANDALL L. SHERROD,  
Criminal District Attorney  
Randall County, Texas

- \* DEANE C. WATSON,  
Assistant Criminal District Attorney  
Associate, Appellate Section
- \* COUNSEL OF RECORD  
Randall County Courthouse  
Canyon, Texas 79015  
(806) 655-2188

*Attorneys for Petitioner.*

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## QUESTION PRESENTED

Does the Equal Protection Clause of the Fourteenth Amendment require application of the presumption of judicial vindictiveness stated in *North Carolina v. Pearce*, 395 U.S. 711, or is such a presumption rebutted, in a jurisdiction where the defendant has the right to elect to have either the jury or the judge assess punishment, under the following facts:

- (1) Defendant elected to have the jury assess his punishment at his first trial;
- (2) Defendant filed a Motion for New Trial which was granted by the presiding judge;
- (3) Defendant elected at his second trial to have the same presiding judge determine his punishment;
- (4) The same presiding judge assessed greater punishment than the jury assessed at the first trial;
- (5) The same presiding judge filed Findings of Fact and Conclusions of Law stating reasons based on evidence first heard at the defendant's second trial, for assessing the greater punishment?

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## OPINIONS AND ORDERS OF THE COURTS BELOW

The opinion of the Court of Appeals for the Seventh Supreme Judicial District of Texas, at Amarillo, dated February 3, 1983, with the additional opinion of that Court denying rehearing, dated March 18, 1983, are both reported as *McCullough v. State of Texas*, 680 S.W.2d 493, (Tex. App. — Amarillo — 1983). These opinions are also printed in the Joint Appendix (J.A. 36, for that Court's original opinion; and J.A. 43 for its opinion denying rehearing)

The opinion of the Texas Court of Criminal Appeals in this same cause, but numbered 351-83 in that Court, on Discretionary Review on its own motion, delivered December 7, 1983, is printed in the Joint Appendix (J.A. 45). It is not yet reported.

The Opinion of the Texas Court of Criminal Appeals in this cause, under its same cause number 351-83, on State's Motion for Rehearing on Petition for Discretionary Review, dated December 5, 1984, is printed in the Joint Appendix (J.A. 47). It is not yet reported.

The Order of the Texas Court of Criminal Appeals denying leave to file State's second motion for rehearing and staying execution of mandate, dated February 20, 1985. It is not reported. It is printed in the Joint Appendix (J.A. 57).

## JURISDICTION

Within the time allowed by applicable Texas Rules and Statutes, the State of Texas presented this matter to the Texas Court of Criminal Appeals, requesting Discretionary Review. The Court of Criminal Appeals granted Discretionary Review of the decision and holdings of the Court of Appeals for the Seventh Supreme Judicial District at Amarillo. Subsequently on December 7, 1983, the Texas Court of Criminal Appeals rendered its Opinion on Discretionary Review. In that opinion the Texas Court of Criminal Appeals sustained the Amarillo 7th Court of Appeals by answering adversely the question presented in this Brief. On a different question not germane to the one presented herein, the Texas Court of Criminal Appeals reversed the Amarillo Court of Appeals on the matter of reformation of punishment (J.A. 46). Shortly thereafter, the Court of Criminal Appeals granted the State's First Motion for Rehearing and, on December 5, 1984, that Court delivered its final opinion on the same question herein, adversely to the State contentions and position. A timely filed Motion by the State of Texas for leave to file State's Second Motion for Rehearing, accompanied by the State's Second Motion for Rehearing, was denied on February 20, 1985 by the Texas Court of Criminal Appeals (J.A. 57). The Petition for a Writ of Certiorari granted hereby this honorable Court was docketed in this Court on January 23, 1985 and was granted on June 10, 1985. Petitioner has raised the issue indicated in the foregoing Question Presented at every stage of these proceedings.

This Court's Jurisdiction is invoked under 28 U.S.C. § 1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV of the United States Constitution:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 37.07, Code of Criminal Procedure of Texas:

This Article 37.07 expresses the Statutory Requirements regarding the assessment of the punishment upon a defendant who is convicted in any criminal case other than a misdemeanor case of which the justice court or the municipal court has jurisdiction. Essentially, this statute provides for a bifurcated trial, with the finding of guilt or innocence being the first duty of the jury, with Section 2(b) thereof providing that in the event of a finding of guilty then it is the responsibility of the judge to assess the punishment applicable to the offense; However, that statute in Section 2(b)2 permits the defendant, at the time he enters his plea in open court, to choose as the determiner of his punishment that same jury which determined guilt or innocence. If the defendant makes no election then the trial

judge is required to determine and assess punishment if the jury makes a finding of guilty.

Article 37.07 is printed in the Joint Appendix (J.A. 54).

## STATEMENT OF THE CASE

On Saturday morning, April 5, 1980, George Preston Small's body was found in his Amarillo home by a friend. [S.F., Cause No. 3442-C, Vol. 1, P. 7] Mr. Small lived alone in a quiet residential area. The friend who discovered the body notified police who came and examined the scene.

Mr. Small's bed was covered with his blood. His body was face up on the floor near the bed. There were multiple stab wounds in his chest and his throat had been slit through and through in two parallel places.

The murder weapon was established to be a large, ten inch, hook bladed butcher knife found nearby. Decedent had also been bludgeoned numerous times on the head and face. [S.F., Cause No. 3442-C, Vol. 1, P. 23-62] According to the pathologist the cause of death was massive hemothorax secondary to stab wounds in the chest. [S.F., Cause No. 3442-C, Vol. 1, P. 75]

The friend who found the body had been in Mr. Small's home as late as 8:45 the night before, and had been invited there for breakfast the next morning, Saturday, when he found Mr. Small dead.

A few days later, Homicide officers for the City of Amarillo apprehended three suspects who subsequently were all indicted for this murder. Sanford James McCullough, Respondent, was the first of them to be tried.

In September, 1980, in a two part trial consisting of the guilt or innocence phase and the punishment phase, the jury found the Respondent guilty of the murder of George

Preston Small.<sup>1</sup> In that first trial, Respondent had made the written election (J.A. 11) required by Article 37.07 Texas Code of Criminal Procedure (J.A. 54). In his written election he chose the jury to assess his punishment following their guilty verdict (J.A. 11). Therefore, the court conducted the second phase of the trial in which the jury received evidence and determined the punishment. In the punishment hearing the jury set Respondent's punishment at 20 years confinement (J.A. 14).

Within the statutory time, the Respondent filed his Motion for New Trial to the same court and judge who conducted his first trial (J.A. 17). He alleged in that Motion that the trial judge had erred in denying his motions for mistrial during the trial proceedings. He also complained of impropriety in the prosecution's jury arguments and in its cross-examination of one of Respondent's defense witnesses.

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<sup>1</sup> The other two suspects, also later convicted of the George Small Murder, were relatives of the Respondent. They were Dennis McCullough, Respondent's brother, who pleaded guilty on January 5, 1981, and by plea bargain before the same Judge who conducted Respondent's trials, was sentenced to 50 years confinement. The other, Kenneth Wayne McCullough, respondent's cousin, pleaded not guilty. Following a finding of guilty by the jury on February 5, 1981, he elected to be sentenced by the same judge who conducted Respondent's trial and the Dennis McCullough trial. That Judge sentenced Kenneth McCullough to 50 years confinement.

The same trial judge granted Respondent's Motion for New Trial.

The second trial began on December 11, 1980, before the same judge. On December 12, 1980, the second jury found Respondent guilty, again, of the murder of George Small. This time, as allowed by Article 37.07, Texas Code of Criminal Procedure (J.A. 54), the Respondent elected in writing to have the Court assess his punishment instead of the jury (J.A. 25).

The Trial Judge who had presided over both trials of Respondent assessed his punishment at 50 years confinement (J.A. 29). Thereafter, upon motion of the Respondent, the trial judge prepared and filed with the record written findings of fact and conclusions of law expressing a number of reasons why she assessed a greater punishment for Respondent than the first jury had set in the first trial (J.A. 33). Before stating her reasons for the greater sentence in the second trial, the judge pointed out that:

The rule prohibiting the assessment of a heavier sentence upon re-trial under the circumstances set forth in *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed2d 89, 656 S. Ct. 2072, and the cases following the precedent outlined in *Pearce* do not apply to this case because the defendant voluntarily elected to have the jury, rather than the judge, set punishment at the first trial. (J.A. 33)

The reasons given in the Findings and Conclusions of the Judge (J.A. 33) substantiate the use of considerations apart from any indication of vindictiveness. Her reasons reveal that she considered matters appropriate to be considered by any trial judge in an original determination of an appropriate punishment.

In his appeal, the Respondent raised the question of the constitutionality of his sentence, even though the first sentence imposition was by a jury and the second by the judge. Neither the record, nor the briefs, nor any motion made by Respondent contain any allegation that the judge, who assessed the greater punishment, did so out of vindictiveness. Respondent's only complaint as to the greater sentence is that the trial judge failed to follow the prophylactic procedural rule recommended in *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed2d 656 (1969). He interprets that rule to require the application of all of the *Pearce* safeguards even in a situation such as ours, where no vindictiveness is alleged, and none is indicated in the evidence, and where no circumstances exist to raise any presumption of vindictiveness.

## SUMMARY OF ARGUMENT

Due Process, under the Constitution, is satisfied in cases where a defendant successfully appeals from a sentence imposed by a jury, and in his second trial receives a more severe sentence from the judge who conducted both trials, under a system of state statutes giving every defendant the sole choice of judge or jury to assess his punishment in the event of a conviction.

The Presumption of Vindictiveness prescribed in the *Pearce* rule does not arise in such circumstances outlined above unless, perhaps, the defendant should elect to have the same judge assess his punishment in both trials. Even in that circumstance he would not be exposed to "chilling effects" that he could not by his own free choice avoid. The circumstances in our case reveal that the trial judge was not given the opportunity to invoke her own discretion in assessing punishment according to the evidence adduced during the first trial. The Respondent could avoid any possible chilling effect on his Due Process rights by electing to have another jury assess his punishment at this second trial. Under a statute such as ours, the right to this election removes the "chill". These distinctions make our case an exception to the "Presumption of Vindictiveness" rule announced in *Pearce*. Indeed, there is no reason for attempting to apply such a presumption in our case, where such a right of election is assured by statute.

Our case satisfies the same rationale this court expressed in its holding that Due Process is not offended in a case where a jury, after a successful appeal, sets greater punishment against a defendant than the jury did in his first trial. *Chaffin v. Stynchcombe*, 412 U.S. 17, 36 L.Ed2d 714, 93 S. Ct. 1977 (1973). In both cases, new untainted discretion was exercised in the second sentence.

Another reason not to find the presumption that arose in *Pearce* is that after the first trial our judge voluntarily

granted a new trial through the exercise of its own judgment. It was not forced into a new trial through any wrath-producing rebuke by an appellate court. Its actions in granting a new trial were based on its own judgment. Therefore, *Pearce* circumstances that might have motivated vindictiveness, or shocked away the right of appeal, did not exist.

A third distinction from the *Pearce* decision found in our record are the findings made by the trial judge (J.A. 33). When considered with our other distinguishing circumstances these findings are significant. They establish that the sentence set by the court did not arise from vindictive motives that might violate due process. One of them reinforces the first reason discussed in this summary that precludes any violation of due process. It is the finding that the court's discretion as to proper sentence, invoked for the first time, called for greater punishment than was determined by the first jury.

The elements recited above all serve to distinguish our case from the holding in *Pearce*.

## ARGUMENT

### I. INTRODUCTION

The enhanced sentence assessed against the Respondent in our case does not violate the principles expressed in *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed2d 656, 89 S. Ct. 2072 (1969), because of the following factors that distinguish our case from *Pearce*:

1. Under our state statute allowing a defendant the right to elect a judge or jury to assess punishment, electing a judge at the second trial to exercise his discretion for the first time, after a jury has set sentence in a first trial, has no chilling effect upon the defendant's right of due process, regardless of the sentence that the judge may assess.
2. The voluntary grant of a new trial instead of experiencing a higher court's reversal prevented the vexing elements that would produce a presumption of vindictiveness.
3. The Court's reasons for the enhanced sentence, although not based entirely on the defendant's identifiable conduct *occurring after* the time of the original sentencing proceeding, clearly rebut any presumption of vindictiveness that may have arisen under the *Pearce* rationale.
4. The record does not contain any allegation or indication of vindictiveness by the court.

## II. EXERCISE OF DISCRETION FOR THE FIRST TIME BY THE SENTENCING AUTHORITY

This case is the first occasion we have found for this court to determine whether having the statutory right to select either judge or jury to assess punishment cures the presumption of vindictiveness to which a defendant may be entitled under *North Carolina v. Pearce*, *supra*, growing out of an enhanced sentence by a trial judge following the granting by that judge of a new trial. As to whether Due Process is offended under such circumstances, could it depend on whom the defendant selects, or in what order of succession the selection is made? Justice should not be required to depend upon such manipulations by anyone motivated only by the desire to avoid punishment for his crime. Reason would make it appear that extending to defendants the sole privilege to select the sentencer should provide adequate warmth against the chilling aspects of an appeal.

In jurisdictions such as ours, the defendant has the power to have a jury assess his punishment at the second trial. He is thus assured of an impartial sentencing authority if he so desires. In *Chaffin v. Stynchcombe*, 412 U.S. 17, 36 L.Ed2d 714, 93 S. Ct. 1977 (1973), this Court found that due process was not offended by the law in Georgia which provided for unrestricted jury sentencing in a second trial, in a case where the first jury assessed fifteen years and the second jury assessed life imprisonment. *Chaffin* established that if a state concludes that jury sentencing in criminal cases is preferable to judge sentencing, nothing in the due process clause of the fourteenth amendment intrudes upon that choice. By the same token, it should be the rule that when a state, instead of choosing and mandating that choice, grants to all defendants the sole choice of the sentencing authority, between judge or jury, coupled with a bifurcated trial in which the question of guilt is first determined, no chilling

effect upon the right to appeal would exist to unconstitutionally deter any defendant wishing to seek a new trial. This unrestricted right to choose his sentencer provides every defendant with the constitutional means to prevent the "chill factor" from having any effect upon his appeal plans.

Another significant similarity of the rule in *Chaffin*, where one jury assessed greater punishment in the second trial than was assessed by the first jury, to the rule we seek in our case, is shown in the following reasoning. In *Chaffin*, as in our case, the discretion of the determiner of punishment at the second trial had never been expressed. In our case, as in *Chaffin*, the discretion of the sentencer was invoked, for the first time, at the second trial — and in our case by the defendant's own unfettered choice. In *Chaffin*, more restrictions were upon the defendant. He had no choice of the sentencer. The reasoning in *Chaffin* applies strongly to our case. Some of that reasoning is found in the following quotation from that decision:

While we reaffirm the underlying rationale of *Pearce* that vindictiveness against the accused for having successfully overturned his conviction has no place in the resentencing process, whether by judge or that due process of law does not require extension of the *Pearce* type restrictions to jury sentencing.

*Chaffin*, 412 U.S. 17, 18.

Neither should *Pearce*-type restrictions be extended to Judge sentencing in cases where the judge's discretion as to sentencing was not previously invoked and where the defendant held the "antidote" for any possible vindictive "poison" by being able to select his own sentencing authority.

One last, and very important aspect of *Chaffin* that should be emphasized is found in the following. Although the parties in *Chaffin* agreed that the jury was not aware of the length of the sentence meted out by the jury in the first trial, the court pointed out that the jury *was* informed by one of Petitioner's own witnesses that he had been "tried previously on the same charge". *Chaffin*, 412 U.S. at 21. This fact is similar to our situation where the same judge conducts both trials, but is only selected by the defendant to assess punishment at the second trial, following the first trial sentence by the jury. Under both situations the sentencing authority is aware that there was (a) previously a trial (b) a sentence, and (c) a successful appeal before the defendant approached the sentencer for assessment of punishment. Under these circumstances, where is the logic in presuming a jury to be free from vindictiveness and unconstitutional prejudice, and at the same time requiring a judge to rebut the presumption that he is guilty of such motivation? Logically, it appears that the facts available to our judge that could engender vindictiveness, under the reasoning in *Pearce* were equally available to the *Chaffin* jury, i.e. that the defendant there had been tried, convicted, then granted the new trial benefits to be derived from a successful appeal. The inescapable question arises, why should laymen jurors be entitled to a presumption of propriety which will not be accorded to a judge trained in propriety? The only answer is that this entitlement should not arise. To explain it by stating that the greater burden should be on the judge who is part of the system does not satisfy the question in our society where judges are taught to react reasonably, and not vindictively, to the morals of the marketplace. Nothing should prevent the sentencing authority who is assessing punishment for the first time, whether judge or jury, from exercising the discretion and range of punishment granted by law. The *Pearce* holding does not require such inconsistency in a comparison of the *Chaffin* facts to ours.

This Court, also, did not apply the *Pearce* presumption of vindictiveness to the circumstances of possible chilling effects of prosecutorial vindictiveness in *Bordenkircher v. Hayes*, 434 U.S. 357, 54 L.Ed2d 604, 98 S. Ct. 663 (1978). There, this Court held that due process was not implicated when the prosecutor threatened to seek a conviction of the defendant on a greater offense with greater punishment if the defendant did not plead guilty. In fact, the greater offense was, thereafter, charged, and the prosecutor proceeded to trial by jury in which the defendant was convicted and given a life sentence due to enhancement because of prior felony convictions. In *Bordenkircher*, as in our case, there was a choice available to the defendant. That choice, essentially, was in *Bordenkircher* to take the sure five year sentence first offered, or gamble on a higher one by choosing a jury trial to determine the forgery charge and also the prior convictions that might result in a life sentence enhancement. Our Respondent's choice was to take the 20 year sentence to which he was assured, or gamble on a higher or lower one by seeking a new trial; then, when the new trial was granted, without the intervention of any higher court, to select the sentencing authority which the respondent felt would be most lenient. These clear choices, with knowledge of the possibilities involved, in both *Bordenkircher* and our case, are similar to characteristics of several cases this court has called the "*Pearce* progeny". Those characteristics have been held to remove the chill that would violate Due Process.

In the case at bar, at the second trial, the respondent could, of course, have selected the jury to assess his punishment. Doing so would have avoided all possibility of any vindictiveness under the law of *Chaffin*, 412 U.S. 17. Instead, he chose the judge as his sentencing authority. Why did he make that choice? There may have been at least two reasons: (1) The respondent knew there was a very good possibility another jury could assess a greater sentence based solely on the brutal evidence involved at the trial; and (2) The respondent believed by electing the

trial judge to assess punishment he might be able to invoke the *Pearce* rationale and limit the upper range of punishment he could receive, and at the same time argue, perhaps persuasively, for a lesser punishment. None of these reasons are based on any denial of due process. According to the rationale of *Chaffin*, any concern with due process could be resolved by the respondent's own choice in electing a jury to assess punishment at his second trial.

*Colten v. Kentucky*, 407 U.S. 104, 32 L.Ed2d 584, 92 S. Ct. 1953, (1972), is another case in which the *Pearce* presumption was held not to apply. Its result is comparable to ours and should aid in an appropriate disposition of this case. A description of the circumstances in *Colten* appears in the *Chaffin*, supra, opinion at 412 U.S. 26, as follows:

A similar focus on actual vindictiveness is reflected in the decision, last term, in *Colten v. Kentucky*, 407 U.S. 104. The question in that case was whether the *Pearce* principle applied to bar the imposition of a higher sentence after a de novo trial in those jurisdictions that employ a two-tier system of trial courts, while noting that it may often be that the de novo "appeal" court will impose a punishment more severe than that received from the inferior court, [Id., at 117, 32 L.Ed2d 584] we were shown nothing to persuade us that the hazard of being penalized for seeking a new trial, which underlay the holding in *Pearce*, also inheres in the de novo trial arrangement. Id., at 117, 32 L.Ed2d 584.

*Chaffin* went on to say that "in short, the Due Process Clause was not violated because the 'possibility of vindictiveness' was not found to inhere in the two-tier system". Id. Where does our case depart from the rationale in both *Colten* and *Chaffin*? No valid distinction can

arise. In fact, in our circumstances there is a stronger basis to absolve a judge, trained in tolerance, from vindictiveness than to forego the presumption in a jury that administers life imprisonment following a fifteen year sentence with virtually the same awareness of the history of the case, as occurred in *Chaffin*. No restraints should be placed on the trial judge the first time that judge exercises her discretion as to proper punishment *unless* the record affirmatively shows vindictiveness in the assessment.

In *United States v. Goodwin*, 457 U.S. 368, 73 L.Ed2d 74, 102 S. Ct. 2485 (1982), the question of prosecutorial vindictiveness arose. There, the court declined to apply the *Pearce* rule requiring reasons from the judge or prosecutor, where the prosecutor obtained an indictment and a conviction with much greater punishment after the defendant changed his mind on a plea bargain arrangement. There, the Court said:

The imposition of punishment is the very purpose of virtually all criminal proceedings. The presence of a punitive motivation, therefore, does not provide an adequate basis for distinguishing governmental action that is fully justified as a legitimate response to perceived criminal conduct from government action that is an impermissible response to noncriminal, protected activity. Motives are complex and difficult to prove. As a result, in certain cases in which action detrimental to the defendant has been taken after the exercise of a legal right, the court has found it necessary to 'presume' an improper vindictive motive. Given the severity of such a presumption, however — which may operate in the absence of any proof of an improper motive and thus may block a legitimate response to

criminal conduct — the Court has done so only in cases in which a reasonable likelihood of vindictiveness exists.

*Goodwin*, 457 U.S. 372, 373

*Goodwin* is easily distinguishable from the circumstances and rationale found in the 1974 holding in *Blackledge v. Perry*, 417 U.S. 21, 40 L.Ed2d 628, 94 S. Ct. 2098. *Blackledge* is another case involving possible prosecutorial vindictiveness, similar to *Goodwin*, *supra*. However, in *Blackledge*, *supra*, where the *Pearce* presumption was held present and not rebutted, there were vital signs of vindictiveness without any constitutional explanation. Perry, the defendant, was an inmate in the North Carolina penitentiary. He assaulted another inmate. A jury trial ensued in which he was convicted and given a six-month sentence, to be served after his existing prison term. He elected to have a trial de novo in a superior court of North Carolina, which is permitted in that jurisdiction. No error in the first trial was required as a prerequisite to a trial de novo in that jurisdiction. Upon becoming aware that Perry had exercised his right to a trial de novo, but before Perry's appearance for same, the Prosecutor obtained from the grand jury a felony indictment charging Perry with an assault with a deadly weapon with intent to kill and inflict serious bodily injury. Perry pleaded guilty and received a sentence of five to seven years in the penitentiary to be served concurrently with his existing sentence for which he was confined. There, in *Blackledge*, the Court held that the initiation of the felony proceedings against Perry in the Superior Court, in which he was assessed the five to seven years sentence, thus operated to deny him due process of the law. In *Blackledge* there was a distinct act of vindictiveness; whereas our case demonstrates use of non-vindictive discretion. In *Blackledge* the prosecutor interrupted the exercise of an appellate right granted to the defendant. In our case, the Judge preserved that right when sought by respondent and did not

interfere with any choice granted to him by law. The distinctions we see between *Blackledge* and those such as our case — *Colten*, *Chaffin*, *Bordenkircher*, *Goodwin*, and *Wasman v. United States*, 468 U.S. \_\_\_, 82 L.Ed2d 424, 104 S. Ct. \_\_ where the presumption of vindictiveness was held not to apply, is simply that this motive — vindictiveness — was reflected in the very records of *Blackledge* as well as *Pearce*; whereas, in the record of those other cases mentioned above, where the Court refused to apply this presumption, there was no indication found that the courts or the prosecutors were so motivated. Like any presumption, it may be overcome by affirmative evidence appearing in the record.

If it was not clear from the Court's holding in *Pearce*, it is clear from our subsequent cases applying *Pearce* that due process does not in any sense forbid enhanced sentences or charges, but *only enhancement motivated by actual vindictiveness toward the defendant for having exercised guaranteed rights*. In *Pearce* and *Blackledge*, the Court "presumed" that the increased sentence and charge were the products of actual vindictiveness aroused by the defendant's appeals. **IT HELD THAT THE DEFENDANTS' RIGHT TO DUE PROCESS WAS VIOLATED NOT BECAUSE THE SENTENCE AND CHARGE WERE ENHANCED, BUT BECAUSE THERE WAS NO EVIDENCE INTRODUCED TO REBUT THE PRESUMPTION THAT ACTUAL VINDICTIVENESS WAS BEHIND THE INCREASES.**

[emphasis added by briefer]

*Wasman*, 468 U.S. \_\_\_, 82 L.Ed 424, 433.

Under our facts, no constitutional basis exists for the application of the presumption of vindictiveness created in *Pearce*. *Pearce* should apply in those jurisdictions

where the defendant, following a successful appeal, elects the judge to assess punishment at the second trial and receives a greater sentence than given by the jury at the first trial **ONLY** where the record affirmatively shows that the greater sentence was assessed because of vindictiveness. There is absolutely no need for the presumption of vindictiveness to arise without such evidence appearing in the record.

We must remember that under our facts, our trial judge granted a new trial on the defendant's Motion for New Trial. Under these facts, the defendant cannot argue that vindictiveness should be presumed because the trial judge was forced into a new trial through any wrath-producing rebuke by an appellate court. Instead, the trial court, upon its own judgment, decided that a new trial was necessary. No basis for a presumption of vindictiveness should reasonably arise.

### III. REFLECTION IN THE RECORD OF REASONS FOR INCREASED SENTENCE

Perhaps this court will find that the presumption of vindictiveness set forth in *Pearce* should apply whenever a judge assesses a greater sentence in the second trial following a successful appeal. If so, must this case fall under the presumption that the respondent was denied Due Process? Our answer is "no".

Perhaps the most prominent expression found in the *Pearce* opinion, and certainly the one that has attracted the most attention of both state and federal courts, appears near the end of that opinion. 395 U.S. 711, at 726. It appears to be a prescription applicable in cases where the conduct of the trial judge or prosecutor becomes motivated by vindictiveness to an extent likely to intimidate an accused to a point where he is forced to forego a constitutional right. That prescription is well known, but it bears repeating for our purposes here:

In order to assure the absence of such a motivation [retaliatory motivation on the part of the sentencing judge] we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reason for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal. 395 U.S. 711, at 726

In several opinions since the *Pearce* holding, however, this court has discussed the *conclusion* actually reached

by *Pearce* regarding higher sentences in second, or de novo trials. Perhaps the clearest expression in the *Pearce* opinion that substantiates the conclusions reached in the cases sometimes called the "*Pearce progeny*" can be found in the conclusion arrived at by Justice Stewart in that opinion, to-wit:

We hold, therefore, that neither the double jeopardy provision nor the Equal Protection Cause imposes an absolute bar to a more severe sentence upon reconviction. A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, 'in the light of events subsequent to the first trial that may have thrown new light upon the defendant's life, health, habits, conduct, and mental and moral propensities' [*Williams v. New York*, 337 U.S. 241, 245, 93 L.Ed 1337, 1341, 69 S. Ct. 1079]. Such information may come to the judge's attention from *evidence adduced at the second trial itself*, from a new presentence investigation, from the defendant's prison record, or *possibly other sources*. [emphasis ours]

*Pearce*, 395 U.S. at 723

In *Wasman*, 468 U.S. \_\_\_, 82 L.Ed2d 424, a Federal Judge assessed greater punishment in Wasman's second trial than he did in the first. The first sentence, for possession of counterfeit certificates of deposit, involved only 6 months imprisonment, whereas the second sentence assessed by the judge for that offense was two years confinement. The trial judge gave reasons for the greater sentence. The only reason indicated in the record was, simply, that Wasman had, on the first occasion of sentence, only one conviction [certificates of deposit] upon which to base and determine the sentence; whereas, on the second conviction and at the occasion for the

imposition of sentence there was a second conviction (for mail fraud) the charge for which had only been pending against Wasman at the time of his first sentence; and only the sentence and conviction for mail fraud occurred AFTER the original conviction. This court held that the *Wasman* record did not result in a presumption of judicial vindictiveness.

The record in our case clearly reveals that the trial judge's conduct, when respondent selected her to assess his punishment, followed the pathway outlined by the *Pearce* holding quoted above. Indeed, the conduct of the trial and the reasons that the trial judge gave, in our case, also reflect compliance with the "prophylactic" prescription of *Pearce*. The *Wasman*, supra, case recites a significant quotation made by this court, quoting the 11th Court of Appeals, bearing on this element of our argument, to-wit:

The Court of Appeals read *Pearce* to be concerned only with vindictive sentencing, not defendants misbehaving between trials.

*Wasman*, 468 U.S. \_\_\_, 82 L.Ed2d 429.

Elsewhere in the *Wasman* opinion this Court said:

It is now well established that a judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence. The sentencing court or jury must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed. Justice Black made this point when, writing for the court in *Williams v. New York*, 337 U.S. 241, 247, 93 L.Ed.1337, 69 S. Ct. 1079 (1949) he observed that 'Highly relevant — if not essential — to the selection of an appro-

priate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.' Allowing consideration of such a breadth of information ensures that the punishment will suit, not merely the offense, but the individual defendant.

*Wasman*, 468 U.S. \_\_\_, 82 L.Ed2d 430.

Our record in the case at bar reflects a number of relevant reasons given by the trial judge as to why she assessed greater punishment. All of them are logical and are supported by other portions of the record. They strongly assert no judicial vindictiveness. An examination of those reasons demonstrates an original exercise of discretion by the trial judge and not that the enhanced sentence was motivated by any vindictiveness. More importantly, those reasons also reflect that the new sentence by the trial judge was arrived at in the light of events subsequent to the first trial that did throw "new light upon respondent's life, health, habits, conduct and mental and moral propensities". Those events included information for the first time from witnesses and from respondent's conduct and demeanor during the second trial. Beginning at page 33 of the Joint Appendix accompanying this brief are found the trial judge's reasons, establishing her basis for the greater sentence. We summarize this as follows:

1. In 1(a) on P. 33, Joint Appendix, the judge highlighted the testimony of two witnesses who did not testify at the first trial. The significance she attributed to their testimony is that it directly implicated the respondent in the actual commission of the murder of the victim, more strongly establishing respondent's having administered the death blows to the victim. (Carolyn Sue Hollison McCullough, S.F., Vol. I, Cause 3442-C, PP. 148-160) (Willie Lee Brown, S.F., Vol. I, Cause 3442-C, PP. 129-147) Thus, respondent was more established in the Judge's

mind, in the second trial, as a direct participant in the victim's murder than in the first trial, where his participation in causing the victim's death was not as certain.

2. In 1(b) through (g) of her reasons, the references made by the trial judge to various witnesses (J.A. 34 [c]) whose testimony confirmed the wounds discovered by the coroner to have been inflicted by the Respondent gave stronger indications in the second trial to the propensities of respondent toward brutality and the resulting threat to society.

3. In the second section of her reasons for assessing greater punishment, our trial judge made reference to having learned during the second trial that respondent was only four months out of the Texas Department of Corrections when he committed this murder (J.A. 34 [2]). This appeared to be a reference to the absence of any reformation in the life of respondent resulting from the previous imprisonment, and was a sound motive, not indicative of vindictiveness, for enhancement of the jury's original determination of punishment.

4. In her third section of the reasons for the enhanced sentence, our trial judge revealed what is reflected in many of the opinions of this court, that reasonable minds vary as to appropriate punishment. This judge candidly expressed the fact that "if the defendant had elected to have the court set his punishment at the first trial, the court would have assessed more than the twenty (20) year sentence imposed by the jury". Since the absence of judicial vindictiveness on the part of the judge in imposing sentence is the cardinal consideration in our case at bar, what could be more clear in showing its absence than for the court to indicate its own conclusions as to what appropriate punishment would be for the crime for which respondent had been convicted, dispelling any such motivation.

5. The absence of remorse on respondent's part was observed and expressed by the court in some of the reasons expressed for the enhanced sentence. It was reflected in the respondent's attitude and reactions during the second trial. These should be matters appropriately regarded by any sentencing authority in the consideration of an appropriate sentence. Is any precedent required to substantiate that one purpose of punishment is to reform? The absence of remorse is indicative of no reformation. This remorselessness blends with the court's findings that the respondent's lifestyle, habits, and conduct threatened society to the extent that the appropriate punishment would be 50 years confinement.

The foregoing reasons sufficiently overcome any presumption of vindictiveness created under *Pearce* and affirmatively show the reasons for the sentence assessed by the trial judge, when first exercising her discretion as to a proper punishment for respondent's having committed this brutal crime. Any presumption of vindictiveness that might have arisen has been negated by the evidence as to motivation of the judge in her determination of the appropriate sentence for respondent.

#### IV. ABSENCE OF ALLEGATION OF VINDICTIVENESS

Respondent has not alleged that the trial judge was vindictive in either of his trials.<sup>1</sup> His appeal in the courts below contended, only, that our case is "automatically" tainted with the presumption of vindictiveness. That contention results from a mistaken impression as to what *North Carolina v. Pearce*, supra, holds. Given the facts and statutory privileges of the defendant in our case, an allegation of, or some showing of vindictiveness on the part of the court is necessary. An enhanced sentence set by the judge at a second trial is not an indication of vindictiveness, violating due process, where the judge's discretion has never before been invoked in the determination of a proper sentence, and where the defendant selected the sentencing authority.

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<sup>1</sup> Respondent's original "Appellant's Brief" filed in and part of the record of the Court of Appeals for the Seventh Supreme Judicial District of Texas, at Amarillo, in No. 07-81-0141-CR, reveals that Respondent's Third Ground of Error alleged nothing more than the court's omission of its reasons for the higher sentence based on objective information as to events occurring after the first trial, and that the Respondent never expressed any indication or allegation that charged the trial judge with being motivated by vindictiveness.

*Moon v. Maryland*, 398 U.S. 319, 26 L.Ed2d 262, 90 S. Ct. 1730 (1970), followed on the heels of *Pearce*. *Moon* is authority for the conclusion that unless there are allegations of vindictiveness on the part of the trial judge, its presence will not be presumed to have motivated an enhanced sentence following successful appeal. First, in *Moon*, this Court said that it granted certiorari because the record contained no findings by the trial judge indicating compliance with the objective information regarding defendant giving rise to the higher sentence. However, in its Per Curiam opinion, after an affidavit

had been attached to the Respondent's, Maryland's, brief through which the trial judge supplied written reasons for the higher sentence, this court went on to say:

Those reasons clearly include 'objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.' *But the dispositive development is that counsel for the Petitioner has now made it clear that there is no claim in this case that the due process standard of Pearce was violated. As counsel forthrightly stated in the course of oral argument, 'I have never contended that Judge Pugh was vindictive'. Accordingly, the writ is dismissed as improvidently granted.*  
[emphasis added]

*Moon*, 398 U.S. at 320

This holding in *Moon* makes it clear that any presumption of vindictiveness that might arise out of a judge's imposition of a higher sentence than he imposed at the first trial does not arise when there is no accusation by the defendant of vindictiveness, and no indication thereof in the trial record.

## CONCLUSION

In Conclusion, we submit that the Court of Appeals for the Seventh Supreme Judicial District of Texas, at Amarillo, and the Court of Criminal Appeals of Texas did not correctly apply the law, as determined by this Court, to the trial judge's compliance with the Due Process clause of the Fourteenth Amendment in the trial court's determination of the fifty year sentence assessed against respondent for the murder of George Preston Small.

For the foregoing reasons, the petitioner respectfully requests that the judgment of the Texas Court of Criminal Appeals be reversed.

Respectfully submitted,

RANDALL L. SHERROD,  
Criminal District Attorney  
in and for Randall County, Texas.  
Randall County Courthouse,  
Canyon, Texas 79015  
(806) 655-2188

Counsel for Petitioner

\* Deane C. Watson,  
Assistant Criminal  
District Attorney,  
Randall County, Texas

\* Counsel of Record